SUPREME COURT
OF THE UNITED STATES

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          IN THE SUPREME COURT OF THE UNITED STATES
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JUSTIN RASHAAD BROWN,                  )

               Petitioner,       )

          v.                     ) No. 22-6389

UNITED STATES,                         )

               Respondent.       )

- - - - - - - - - - - - - - - - - - -
EUGENE JACKSON,                        )

               Petitioner,       )

          v.                     )  No. 22-6640

UNITED STATES,                         )

               Respondent.       )

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Pages:  1 through 97

Place:  Washington, D.C.

Date:  November 27, 2023
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 3      JUSTIN RASHAAD BROWN,                )
 4                      Petitioner,          )
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 6      UNITED STATES,                       )
 7                      Respondent.          )
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 9      EUGENE JACKSON,                      )
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11                 v.                        )  No. 22-6640
12      UNITED STATES,                       )
13                      Respondent.          )
14      - - - - - - - - - - - - - - - - - - -
15
16                      Washington, D.C.
17                 Monday, November 27, 2023
18
19          The above-entitled matter came on for
20      oral argument before the Supreme Court of the
21      United States at 10:03 a.m.
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 1    APPEARANCES:

 2    JEFFREY T. GREEN, ESQUIRE, Washington, D.C.; on behalf

 3         of Petitioner Justin Rashaad Brown.

 4    ANDREW ADLER, Assistant Federal Public Defender,

 5         Fort Lauderdale, Florida; on behalf of Petitioner

 6         Eugene Jackson.

 7    AUSTIN RAYNOR, Assistant to the Solicitor General,

 8         Department of Justice, Washington, D.C.; on behalf

 9         of the Respondent.

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1   C O N T E N T S

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1   P R O C E E D I N G S

2   (10:03 a.m.)

3   CHIEF JUSTICE ROBERTS: We'll hear

4   argument this morning in Case 22-6389, Brown

5   versus the United States, and the consolidated

6   case.

7   Mr. Green.

8   ORAL ARGUMENT OF JEFFREY T. GREEN

9   ON BEHALF OF PETITIONER BROWN

10   MR. GREEN: Mr. Chief Justice, and may

11   it please the Court:

12   Once more we confront the Armed Career

13   Criminal Act, this time with regard to which

14   drug schedules a sentencing court is to consult

15   in order to determine whether a prior state drug

16   crime is a match with those federal schedules

17   and, thus, either is or is not a predicate under

18   the ACCA.

19   We submit that the sentencing court

20   should use the schedules that are current at the

21   time of sentencing. That is because, at its

22   core, the ACCA is a sentencing enhancement. It

23   is not a crime unto itself. And this Court has

24   said that the ordinary practice is to apply

25   current law, including at sentencing.

1   There's no reason to deviate from that

2   ordinary practice here. The statute is phrased

3   in uniformly present terms. The goal of the

4   ACCA is to incapacitate only the most serious

5   offenders. And, finally, to do otherwise, as

6   the government suggests, would be to ignore

7   entirely Congress's choice to change those drug

8   schedules with the 2018 Farm Bill.

9   With that, I invite the Court's

10   questions.

11   JUSTICE THOMAS: Mr. Green, didn't we

12   say in McNeill that looking at the statute is a

13   backward-looking exercise?

14   MR. GREEN: You certainly did, Justice

15   Thomas. And McNeill, however, is actually a

16   complement in some sense for this case, not a

17   barrier, and the reason why I say that is that

18   McNeill looked at the historical facts of the

19   state crime. We are now engaged in the

20   present-tense effort to figure out what the

21   federal sentence should be, including a

22   potential ACCA mandatory minimum enhancement.

23   McNeill acknowledged, as I just said,

24   that the statute is phrased in the present

25   tense, but McNeill found a particular problem,

1   and that was that if a state reformulates its

2   criminal laws -- and the Court pointed to a

3   Sixth Circuit case about how to assess drug

4   weight -- different prior state crimes could

5   disappear because a court couldn't figure out

6   under the new formulations what the maximum

7   sentence would be.

8   JUSTICE THOMAS: So let me ask you a

9   question, and then I'll let you go, but what if

10   just say, using your logic and your approach,

11   there was a crime, some -- a -- a state offense

12   that was not on the schedule, it was not

13   included on the controlled substance schedule,

14   but then, subsequently, after the commission of

15   the state crime but before sentencing, it's

16   added? How would you -- how would that work

17   under your logic or your approach?

18   MR. GREEN: Well, if the government --

19   if the government tried to make that a match, I

20   think the defendant might have the opportunity

21   to claim that that was an ex post facto

22   application of the law. In other words, it

23   wasn't a match at the time of the offense, but

24   it is now a match at sentencing.

25   And we would say under our approach

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1    that, yes, it is a match, but the Ex Post Facto
2    Clause would be a barrier to applying the -- the
3    newer drug schedules there.  And, there, you
4    would shift back to the drug schedules that
5    apply at the time of the federal offense, the
6    922(g) offense.
7              JUSTICE SOTOMAYOR:  Isn't that an
8    argument why that -- your reading is strained?
9    You're building in an ex post facto problem.
10             MR. GREEN:  Well, respectfully, Your
11   Honor, we're not building in an ex post facto
12   problem because there already is an ex post
13   facto problem.  In other words, we're not
14   avoiding a constitutional question here.  This
15   Court decided in Peugh that a -- if, after the
16   commission of the federal crime, the sentencing
17   range shifted upward, that would be an ex post
18   facto problem, and that was because of the way
19   that the guidelines anchor the sentence.
20             Certainly, here, where we have a
21   statute and not any kind of discretionary
22   exercise, there would be an ex post facto
23   problem potentially with the application of the
24   -- the new drug schedules to -- that had a --
25   that -- that added drugs.
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 1   JUSTICE SOTOMAYOR: Can I ask you what

 2   purpose your rule has to putting a defendant on

 3   notice as to what his potential liability may be

 4   at the moment he commits the federal offense?

 5   At that point, he has no idea what an

 6   enhancement may or may not be based on what

 7   conduct he committed in the state offense or

 8   even in the federal offense. I'm not sure what

 9   rule of interpretation would counsel that

10   approach.

11   MR. GREEN: Respectfully, Justice

12   Sotomayor, I think that's an odd conception of

13   notice to be honest with you. When due process

14   notice problems arise when a -- an offender

15   can't tell where the law is and can't tell what

16   the sentence is. It doesn't usually arise if

17   the defendant -- if the -- if the offender gets

18   a break on the way to the sentencing forum.

19   That's what happened in Dorsey.

20   That's what happened in Peugh. That's what

21   happened in Concepcion. So, if a -- if an

22   offender gets a break on the way, the defender

23   gets the opportunity to take advantage of that

24   break to make the argument.

25   We don't -- we don't say that somebody

1   who is on notice 10, 12, 15 years ago when they

2   commit a state crime should have that crime --

3   JUSTICE SOTOMAYOR: Except, counsel --

4   MR. GREEN: -- or should have the

5   whole thing --

6   JUSTICE SOTOMAYOR: -- that's the

7   whole I -- I want to say fallacy of sentencing

8   enhancements, that somehow, because there's a

9   potential for enhancement, there may be a

10   decision by a defendant not to commit a crime.

11   It's unlikely to ever really happen,

12   but accepting that supposition, your rule

13   doesn't do anything to enhance rejection of a

14   criminal from committing a crime again.

15   MR. GREEN: Well, I think our -- our

16   rule does do something very important, which is

17   to respect Congress's choice to change the drug

18   schedules and to narrow the types of drugs that

19   are going to go onto the federal schedule. And

20   that, of course, affects the matching exercise.

21   So our rule respects the change that Congress

22   made in 2018.

23   And with respect to the prior notice,

24   as I said, I -- I -- I think it's an odd

25   conception to say that you should be culpable

 1   for some future act that you had not even

 2   committed yet because you were on notice at that

 3   time.

 4   JUSTICE BARRETT: Mr. Green, can I ask

 5   you a question about the distinction between

 6   your approach and the time-of-federal-offense

 7   approach? Why does it make sense or why would

 8   it make sense for Congress to say that two

 9   defendants who were convicted at the exact same

10   time should be sentenced differently simply by

11   virtue of when their sentencing happened?

12   I mean, doesn't the other approach --

13   if we're not going to choose the government's

14   approach, it just seems to me like the

15   time-of-federal-offense approach makes more

16   sense of the scheme.

17   MR. GREEN: Well, any -- any

18   line-drawing that's done with respect to the

19   applicability or the matching exercise is going

20   to create some arbitrariness there, and -- and

21   the Court acknowledged that in -- in Dorsey.

22   And, in fact, the same sort of

23   hypothetical that Your Honor posed was discussed

24   in McNeill and also discussed in Dorsey, and the

25   resolution there was that a time-of-sentencing

1   approach uniformly -- even though there's going

2   to be, as I say, arbitrariness to any line --

3   temporal line-drawing exercise that the Court

4   does, the time-of-sentencing position at least

5   anchors it in a way that's consistent throughout

6   and -- and, according to the Court in Dorsey,

7   removes some of the arbitrariness.

8   JUSTICE JACKSON: And isn't that the

9   -- isn't that the sort of way it's ordinarily

10   done in the sentencing world? I mean, I

11   understood that under the sort of normal federal

12   sentencing process, a federal judge applies the

13   sentencing law at the time of sentencing.

14   MR. GREEN: That's correct, Your

15   Honor.

16   JUSTICE JACKSON: So that's the

17   standard in sentencing.

18   MR. GREEN: That is the --

19   JUSTICE JACKSON: So, to the extent

20   that we accept that this ACCA is a sentencing

21   statute, then the kind of normal ordinary course

22   would be to apply a time-of-sentencing rule?

23   MR. GREEN: That's correct. And as I

24   said in the outset, the Court has -- the Court

25   has repeatedly said that. That's also

1   consistent with a very long line of cases going

2   all the way back to, as we say in our brief,

3   Schooner Peggy and Justice Marshall's decision

4   that -- that show that you -- as a general

5   matter, you apply current law.

6   JUSTICE BARRETT: Counsel, let me ask

7   you a question about that, your -- your focus on

8   current law. I mean, you say that you always

9   have to apply the current sentencing, and, you

10   know, similarly, we always apply the statute

11   that's current at the time, which I completely

12   agree with.

13   Do you disagree, however, that

14   Congress could ever enact a statute that

15   referred back to a historical drug schedule as

16   -- as it would be in this case? I mean,

17   wouldn't we still be applying the current

18   version of ACCA even if it incorporated by

19   reference a prior statute?

20   That's not applying an old version,

21   correct?

22   MR. GREEN: Right. Congress --

23   Congress not only can do that, but Congress did

24   that in Section 3559(c), which is in essence a

25   federal three-strikes law.

1   Congress wrote the words if --

2   JUSTICE BARRETT: Well, I -- I -- I

3   understand that Congress phrased it differently

4   there. There was nothing that bound Congress to

5   phrase it the same way here. But I just wanted

6   to clarify that you agree that if Congress -- if

7   we interpret this statute that way to

8   incorporate the historical Controlled Substances

9   Act schedule, we're not applying a prior version

10   of the statute, correct?

11   MR. GREEN: You're not applying a

12   prior version of the statute, no. Well, let me

13   --

14   JUSTICE BARRETT: We're -- we're still

15   respecting the --

16   MR. GREEN: Yes.

17   JUSTICE BARRETT: -- current

18   statute -- he -- the -- the -- the defendant

19   would still be sentenced under the current

20   version on that interpretation of the statute?

21   MR. GREEN: Well, no, because the ACCA

22   incorporates the dynamic Controlled Substances

23   Act and the -- and the drugs --

24   JUSTICE BARRETT: Well -- well, you

25   say -- you say that. I understand that that's,

 1   you think, the best interpretation. All I'm

 2   saying is that if we accept the government's

 3   interpretation, we're not saying that he's

 4   somehow convicted of a different offense under

 5   922? We're just interpreting it differently to

 6   incorporate a prior drug schedule by reference

 7   in the statutory text itself?

 8   MR. GREEN: Justice Barrett, I -- I

 9   would say that you're using -- you're using a

10   version of the ACCA in that instance that is

11   old, right, and because the drug schedules have

12   changed and the ACCA incorporates by reference

13   the drug schedules, so you actually would be

14   using an old version of the ACCA in that

15   instance.

16   JUSTICE JACKSON: Can I ask you about

17   the federal prong of this? The -- we -- this

18   case arises under the state prong, but it seems

19   to me that the sort of weak spot of your

20   argument is whether it is requiring a different

21   rule for the federal prong than the state prong

22   so that when a court is looking back to evaluate

23   "serious drug offense," the definition, as it's

24   applied under the federal prong, is the court

25   just seeing whether or not the person was

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 1      convicted at that historical point of a

 2      particular crime without reference to the

 3      federal schedule or referencing the federal

 4      schedule at that time and you're now arguing

 5      that for the state prong, they should be

 6      referencing the federal schedule at present and

 7      so we would have two different results if those

 8      -- if I'm understanding your rule?  Am I right

 9      about that?  Are -- is the federal requiring the

10      past schedule be employed?

11              MR. GREEN:  Justice Jackson, with

12      respect to (a)(1), the federal --

13              JUSTICE JACKSON:  Yes.

14              MR. GREEN:  -- the -- the -- the

15      federal convictions, I do think some of the

16      arguments that we make about using current law

17      at sentencing and respecting Congress's choices

18      might open up questions about exactly how to

19      interpret (a)(1) in that regard, but we don't

20      need that to prevail here because the Court has

21      already indicated that it is permissible to have

22      different interpretations --

23              JUSTICE JACKSON:  So are you saying --

24              MR. GREEN:  -- of the statute.

25              JUSTICE JACKSON:  -- there would be or
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1   do you have an argument -- like, if I disagree

2   with that, if -- if -- if -- if I think that

3   these two should be read in parallel, is there

4   an argument that the (a)(1) prong, when it says

5   an offense under the Controlled Substances Act,

6   is Congress's invitation to look at what the

7   offenses are today?

8   MR. GREEN: I think, if you said you

9   had to read them in parallel, Justice Jackson, I

10   would say that (a)(1) should also use -- or that

11   in determination of whether there's an -- an

12   (a)(1) predicate, you should also use the --

13   the -- the current schedule.

14   JUSTICE JACKSON: And is that --

15   JUSTICE KAGAN: Well, what would be

16   the -- the justification for that? I mean, if

17   you look at the language of (a)(1), it just

18   refers to a prior conviction. It doesn't give

19   any sense that there's some kind of

20   intertemporal federal-to-federal categorical

21   approach going on.

22   MR. GREEN: Well, that's right. And

23   it -- and it is -- and, you know, in -- in -- in

24   the event that -- that the Court views (a)(1) to

25   be interpreted that way, I mean, we -- we -- the

 1   (a)(2) is really an accident of the fact that we

 2   have to do the matching exercise, right?

 3   And so there would be a sensible

 4   difference between (a)(1) and (a)(2) precisely

 5   because it's categorical.

 6   JUSTICE KAGAN: Right. But, if you

 7   assume that (a)(1) is not doing that, can you

 8   think of any reason why Congress would have

 9   wanted (a)(1) and (a)(2) to work differently?

10   MR. GREEN: Because -- because

11   Congress -- for two reasons. One is, as I said

12   at the outset, Congress only wants to put away

13   the most serious offenders. So, in this regard,

14   the ACCA does look prospectively. The ACCA

15   wants to make sure that we are incarcerating for

16   a mandatory minimum 15 years the people who are

17   the most serious offenders, as I say, and those

18   people who wouldn't be the most serious

19   offenders if Congress had changed the drug

20   schedules, and there's the other point, right?

21   I mean, Congress changed the drug schedules, and

22   that should be --

23   JUSTICE KAVANAUGH: But we all --

24   MR. GREEN: -- respected.

25   CHIEF JUSTICE ROBERTS: Thank you.

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 1          JUSTICE ALITO:  Let's say that --
 2     well, I'm sorry.
 3          CHIEF JUSTICE ROBERTS:  Yeah.  Thank
 4     you, counsel.  One of the things you emphasize
 5     in your -- not emphasize -- raise in your brief
 6     is the complexity that would accompany the
 7     government's approach.  You know, as -- as you
 8     said, prosecutors, courts, probation officers,
 9     defense counsel would have to track down,
10     cross-reference outdated federal.
11          I -- I don't think that's that hard at
12     all and -- and not that I could do it, but, you
13     know, people who are --
14          (Laughter.)
15          CHIEF JUSTICE ROBERTS:   --
16     technologically sophisticated can do it.
17     It's -- apparently, it's all online.  Just check
18     it that way.
19          MR. GREEN:  Well, I would -- I would
20     refer Your Honor to the amicus brief of the
21     National Association -- or, excuse me, the
22     Clause 40 Foundation where they lay out all the
23     databases and they talk about exactly how
24     difficult that the -- that it would be.  It is
25     an exercise, and even if you are a technological
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1   savant, it's an exercise.

2   But we're talking about, as the

3   National Association of Federal Defenders'

4   briefs indicate, we're talking about defense

5   attorneys that have to advise their clients of

6   what the maximum penalty might be. Now that

7   defense attorney has to go back and look at

8   defunct decades-old Codes of Federal

9   Regulations.

10   CHIEF JUSTICE ROBERTS: Well, but I

11   guess my point is they're defunct and they're

12   decades old and they're readily available on

13   current databases with a couple of key strokes?

14   MR. GREEN: But, but -- respect --

15   respectfully, they're not, and that's what the

16   amicus brief shows working through all the --

17   the databases. At some future point, they might

18   be, but at the -- the -- the point of

19   administrability is to demonstrate that there

20   could be problems on the other side just like

21   McNeill was concerned about problems with

22   changes in -- in state reformulation.

23   By the other side, I mean there could

24   be changes to the Code of Federal Regulations

25   that actually get missed because people don't

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1    use the databases right.

2            CHIEF JUSTICE ROBERTS:  Thank you,

3    counsel.

4            MR. GREEN:  We have a -- thank you.

5            CHIEF JUSTICE ROBERTS:  Justice

6    Thomas?

7            Justice Alito?

8            JUSTICE ALITO:  Can I ask you a

9    question about the Rule of Lenity?  Is it true

10   that your approach would in some cases be

11   harsher on defendants than the government's

12   approach?  And if that is true, have we ever

13   said that the Rule of Lenity applies in a

14   situation like that?

15           MR. GREEN:  No, because the Court has

16   said the Ex Post Facto Clause applies in a

17   situation like that.  I mean, I -- I do think

18   there's an argument for lenity here, but I

19   really don't think we need it because the text

20   is clear and the goals of the ACCA are clear and

21   the need to respect Congress's choice in

22   changing the drug schedules is also clear.

23           JUSTICE ALITO:  Is it true that

24   acceptance of your argument would mean that no

25   marijuana conviction prior to 2018 would count
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1   as an ACCA predicate?

2   MR. GREEN: It -- no, because there

3   would have to be a match between the state and

4   the federal. Now, if the federal were broader

5   and -- or, excuse me, if the state were broader

6   and it included hemp, then there would be no

7   match, but I can assure Your Honor, because I've

8   actually looked, that states are catching up

9   rapidly.

10   CHIEF JUSTICE ROBERTS: Justice

11   Sotomayor?

12   Justice Kagan?

13   Justice Gorsuch?

14   Justice Kavanaugh?

15   JUSTICE KAVANAUGH: We know that

16   Congress thought about this because of

17   921(a)(20), the expungement/pardon provision,

18   and so Congress specifically addressed the

19   circumstances under which a prior conviction

20   would no longer count.

21   But it doesn't include this situation.

22   So this is not a case where we're speculating

23   about did Congress -- was -- were they aware of

24   this kind of issue arising. They were and they

25   -- they limited it to those, and we relied on

1   that in McNeill as well.

2   So how do you respond to that?

3   MR. GREEN: Well, I would respond to

4   that by saying that that would simply wipe away

5   all of the categorical approach and the work

6   that the categorical approach does to see

7   whether or not the state drug offense matches

8   the federal drug offense.

9   Expungement also, Your Honor, is not

10   the only thing that can happen along the way to

11   the forum, in addition to the categorical

12   matching, that would cause the predicate to no

13   longer be a predicate. A defendant, for

14   example, can cooperate, and -- and that would

15   eliminate the possibility of a mandatory

16   minimum, assuming the sentencing court accepted

17   the 5k letter from the prosecutor, but --

18   JUSTICE KAVANAUGH: Thank you.

19   CHIEF JUSTICE ROBERTS: Justice

20   Barrett?

21   Justice Jackson?

22   JUSTICE JACKSON: Can I just ask about

23   your sort of textual reading of the state law

24   provision? So, as I understand it, are you

25   saying that when it says "a controlled substance

1   (as defined in Section 102)," et cetera, you

2   mean as currently defined? Is that --

3   MR. GREEN: Yes.

4   JUSTICE JACKSON: -- the way that

5   you're reading it?

6   MR. GREEN: Yes.

7   JUSTICE JACKSON: And -- and -- and I

8   guess the government's position is "as

9   previously defined." So can you just make the

10   best argument for why "currently defined" is the

11   right way to interpret this "as defined"?

12   MR. GREEN: Well, "as" -- "as defined

13   in" --

14   JUSTICE JACKSON: Mm-hmm.

15   MR. GREEN: -- we would maintain is --

16   that's present-tense language.

17   JUSTICE JACKSON: Mm-hmm.

18   MR. GREEN: "Is" is in the statute.

19   That's also present-tense language, even though

20   McNeill found problems that were sufficient

21   enough to ignore the fact that -- that

22   particular present-tense language. "Involving"

23   is also present-tense language.

24   But what it -- what it essentially

25   does, Justice Jackson, is incorporate, as I said

1   earlier, the -- the Controlled substantive --

2   Controlled Substances Act and the drug schedules

3   that are part of that Controlled Substances Act,

4   and those are dynamic and changing.

5   And when Congress enacted the

6   Controlled Substances Act, Congress wanted it to

7   change. Congress said here's the list of drugs,

8   but we're going to change those as -- as -- as

9   they -- we want you to change those as they go

10   along. And they change for important reasons.

11   They change --

12   JUSTICE JACKSON: So would you have

13   expected Congress to have said something static

14   if it didn't mean that? In other words, if it

15   was talking about the historical definitions, it

16   would have said a controlled substance, you

17   know, as defined in the Act at the time of the

18   commission of the state offense --

19   MR. GREEN: Or even --

20   JUSTICE JACKSON: -- or something like

21   that?

22   MR. GREEN: Yeah, or even as then

23   defined. I mean, and as Justice Barrett and I

24   discussed, the -- the 3559(c) shows that

25   Congress knows exactly how to do that. They

1   used almost exactly that language --

2   JUSTICE JACKSON: Thank you.

3   MR. GREEN: -- they have been --

4   CHIEF JUSTICE ROBERTS: Thank you,

5   counsel.

6   Mr. Adler.

7   ORAL ARGUMENT OF ANDREW ADLER

8   ON BEHALF OF PETITIONER JACKSON

9   MR. ADLER: Mr. Chief Justice, and may

10   it please the Court:

11   The 922(g) offense is what triggers

12   ACCA's penalties. The government, therefore,

13   agrees that courts must apply ACCA's criteria in

14   effect at the time of the 922(g) offense, not

15   the prior conviction. For example, if Congress

16   amended ACCA's criteria to delete burglary and

17   someone then committed a 922(g) offense, all

18   agree that a prior burglary conviction would not

19   be an ACCA predicate, even if it was one at the

20   time it occurred.

21   The only question here then is whether

22   ACCA's controlled substance criterion somehow

23   warrants different treatment. And it does not.

24   That criterion expressly incorporates the

25   substances on the federal schedules. Under

1   basic rules of statutory construction, that

2   means the substances are effectively written

3   into ACCA itself. So where a substance is

4   removed from the schedules before the 922(g)

5   offense, it is also removed from ACCA's

6   coverage, no less than burglary in the

7   hypothetical.

8   I welcome the Court's questions.

9   JUSTICE THOMAS: Subsection (e)(1)

10   says that in the case of a person who violates

11   Section 922(g) of this title and has three

12   previous convictions. So we're talking about

13   the previous convictions.

14   Why would we look at a current

15   interpretation -- or a current violation to

16   determine whether or not the previous conviction

17   was -- fit within the statute?

18   MR. ADLER: So, Your Honor, that is

19   the language that this Court interpreted in

20   McNeill, and when it did so, it was referring to

21   the historical attributes of the state law

22   conviction.

23   McNeill said nothing about the federal

24   comparator against which we are comparing those

25   attributes. And that question is governed by

 1   the default principle, the time-of-offense

 2   principle with which -- the government and we

 3   agree on that.

 4   So it's an entirely different question

 5   here. Previous conviction, that's something

 6   that's already happened. So, of course, we're

 7   going to look at the law in effect at the time

 8   of the prior.

 9   The government is not arguing to you

10   as I understand it that we should be looking at

11   the federal criteria in effect at the time of

12   the prior conviction. What I understand the

13   government to be saying is that somehow this

14   controlled substance criteria in ACCA is somehow

15   different than every other criteria.

16   That's why the burglary hypothetical

17   is correct because, even though the burglary

18   qualified under ACCA at the time it occurred, it

19   -- Congress is revising its judgment and saying

20   we no longer think burglary should count.

21   So, if that happens by the time of the

22   922(g) offense, then everyone agrees, I believe

23   the government agrees, that that burglary should

24   not qualify. So it's important to recognize

25   that McNeill was addressing a completely

 1   different question than is presented in this

 2   case. That's why it was such an easy case, we

 3   say.

 4   JUSTICE THOMAS: So you don't think

 5   there's any difference between the reference to

 6   the schedule and actually amending the

 7   underlying statute?

 8   MR. ADLER: That is correct, Your

 9   Honor. And that is -- that is absolutely

10   correct. And the government gives us a single

11   sentence in its brief about why that would not

12   be on page 41, and it's no supporting authority.

13   And all the government says is, well, the

14   schedules are not contained in ACCA and so

15   amending the schedules is not the equivalent of

16   amending ACCA.

17   But, as we explain on pages 8 to 9 of

18   our reply brief, that is simply not true. Under

19   established canons of statutory construction,

20   where one statute incorporates another or

21   cross-references another, that latter statute is

22   effectively contained and written into the

23   former. That's how cross-references work.

24   And if the government really means

25   what it says here, that would have a profoundly

 1   destabilizing effect on legislation in this

 2   country. Congress would have to copy and paste

 3   every statute that it wants to reference, and

 4   if, you know, you think the U.S. Code is

 5   unwieldy already, it would explode if that's

 6   what Congress had to do. And so that cannot

 7   possibly be right.

 8   So then we are left asking: Well, how

 9   -- how are the schedules any different here than

10   the burglary or anything like that? So that's

11   why you see the government relying so much on

12   McNeill. But I don't think the government

13   believes that argument either because, if you

14   really take the government's view of McNeill,

15   then what you're really doing is looking at the

16   federal criteria in ACCA at the time of the

17   prior for all of the criteria. And that is not

18   the government's submission in this case. That

19   proves far too much.

20   JUSTICE KAVANAUGH: I thought the

21   reason it -- it mattered in McNeill or the

22   argument in McNeill was that the prior state

23   conviction no longer qualified as a serious drug

24   offense because the change in the maximum

25   sentence under state law, but the key was that

 1   no longer qualified as a serious drug offense as

 2   a matter of ACCA.

 3   The same argument here is that the

 4   change subsequent to the prior state offense

 5   means that it no longer qualifies as a serious

 6   drug offense under ACCA. Yet, in McNeill -- I

 7   mean, you're well aware the language in McNeill

 8   is -- is not -- not good for you because it's

 9   confronted that and said you must consult the

10   law that applied at the time of that conviction.

11   MR. ADLER: Your --

12   JUSTICE KAVANAUGH: So I -- I guess I

13   see a parallel with McNeill, but -- but --

14   MR. ADLER: Your Honor, the sentence

15   you just quoted has to be read in context. And

16   the law in that sentence is referring to state

17   law. Of course, subsequent changes in state law

18   have no --

19   JUSTICE KAVANAUGH: Right. Sorry to

20   interrupt, but the state law change mattered

21   because it no longer qualified as a serious drug

22   offense as a matter of federal law.

23   MR. ADLER: Your Honor, I -- I

24   disagree with that reading of McNeill. We --

25   JUSTICE KAVANAUGH: Just isn't that an

1   accurate statement, though, about the facts?

2   The change in the state law maximum sentence

3   meant that as of the time of sentencing or

4   later, it no longer was a serious drug offense

5   for purposes of federal law, correct?

6   MR. ADLER: Your Honor, I -- I

7   disagree with the characterization because the

8   state law has nothing to do with whether

9   something is serious enough to be a -- a drug

10   offense. That's something for Congress.

11   And if I could give you an example --

12   JUSTICE KAVANAUGH: Well, let me just

13   pause you there. I -- I thought that it had to

14   be a 10-year sentence, right, to qualify?

15   MR. ADLER: That is correct.

16   JUSTICE KAVANAUGH: Okay. And the

17   change in the state offense meant it was -- no

18   longer had a 10-year sentence?

19   MR. ADLER: It no longer satisfied --

20   JUSTICE KAVANAUGH: So, therefore, it

21   was no longer as a matter of federal law a

22   serious drug offense, correct?

23   MR. ADLER: That would have been

24   correct, but --

25   JUSTICE KAVANAUGH: And McNeill said

 1   that didn't matter?

 2   MR. ADLER: Because states do not get

 3   to decide what is serious enough for ACCA. So I

 4   can give -- if I can give you a hypothetical

 5   that's a variation of the burglary example.

 6   Let's say Congress raises the

 7   statutory maximum threshold from 10 to 20 years.

 8   Someone then commits a 922(g) offense. They

 9   have a statutory maximum and their prior does of

10   15 years. That's not going to qualify because

11   Congress has revised its judgment.

12   McNeill only says that we look to

13   state law in effect at the time of the prior to

14   figure out what the maximum was. That's the 15

15   years. But Congress gets to decide if that's

16   serious enough or not for ACCA. The states

17   don't get to do that.

18   So that's why the state -- change in

19   state law had really nothing to do with the

20   question we are asking here, which is what

21   federal criteria are we looking at. And, again,

22   this is where the default time-of-offense

23   principle comes in that is grounded in the

24   federal saving --

25   JUSTICE KAVANAUGH: One -- one last

1   question on that. It would have meant that it

2   was a serious drug offense for federal law

3   purposes at the time he committed the state

4   offense, correct?

5   MR. ADLER: That -- that --

6   JUSTICE KAVANAUGH: But then was no

7   longer a serious drug offense for purposes of

8   federal law later on, correct?

9   MR. ADLER: That's correct. That's

10   exactly the same thing as the burglary

11   hypothetical with which the government agrees.

12   It would have qualified at the time it occurred,

13   but then Congress changes its judgment and says

14   we don't want burglaries anymore or we think the

15   statutory maximum should be 20 years, so even

16   though it would have qualified at the time it

17   occurred, it no longer does at the time of the

18   922(g) offense.

19   And, again, this time-of-offense

20   principle is a default rule in federal criminal

21   law. It's --

22   JUSTICE JACKSON: But wait, why is --

23   why -- can you speak to the default principle in

24   sentencing, which is not, I think, that you do

25   the sentencing statutes or sentencing

1   enhancements that exist at the time of the

2   offense, you do it at -- do you agree with me

3   that you do it at the time of the sentencing?

4   MR. ADLER: No, Your Honor, I agree

5   with that in terms of the guidelines because the

6   Sentencing Reform Act specifically says for the

7   guidelines you look to the version in effect at

8   sentencing.

9   JUSTICE JACKSON: Mm-hmm.

10   MR. ADLER: But, when we're talking

11   about federal statutory penalties, that's where

12   the federal saving statute comes in, that's

13   where the Ex Post Facto Clause comes in, and

14   under those doctrines, we are always looking at

15   the federal statutory penalties in effect at the

16   time of the crime. That is when we are looking

17   at notice. Is someone on notice that their

18   conduct is unlawful? And what are the potential

19   consequences for violating the law? That

20   happens at the time of the offense, right?

21   So the government is trying to look at

22   notice at the time of the prior conviction,

23   which cannot possibly right -- be right because

24   it would mean that ACCA could not apply to prior

25   convictions that predated its enactment. That

1   would violate the Ex Post Facto Clause.

2   We know that it does not from this

3   Court's decision in Gryger versus Burke, so that

4   confirms that we're looking at notice at the

5   time of the 922(g) offense, and then, once we do

6   that, the administrability problems with the

7   government's rule come into sharp focus.

8   And if I could turn to the Chief

9   Justice's point earlier, what the government's

10   rule would require people to do, ordinary

11   people, not law librarians, is to dredge up

12   decades-old drug schedules. They are not

13   online. The closest database we have is the

14   ECFR, which is published by the National

15   Archives. It goes back only to January 2017.

16   That's not going to do much good for anybody.

17   And --

18   JUSTICE ALITO: Well, couldn't some of

19   your -- some of your amici, the National

20   Association of Criminal Defense Lawyers or the

21   Clause 40 Foundation, put out a -- a handy

22   little handbook for defense attorneys including

23   all of these schedules? So that would solve

24   that problem, wouldn't it?

25   MR. ADLER: Your Honor, the key

 1   response to that is that that is not what

 2   Congress would have intended in 1986 before

 3   there was such a thing as electronic databases,

 4   before there were online digital sources.

 5   That's just not something that a Congress would

 6   have thought to do.

 7   And if you --

 8   JUSTICE KAGAN: You're -- you're

 9   making this argument, am I right, not as a

10   matter of due process? You're just saying it's

11   a key to statutory interpretation?

12   MR. ADLER: Correct. And it also goes

13   to the administrability of the government's rule

14   because not only are ordinary people going to

15   have to do this, but, yes, judges, probation

16   officers, you know, lawyers are going to have to

17   do this. It is extremely difficult to do.

18   JUSTICE GORSUCH: Well, what do you

19   say to the -- your -- your friend's argument I'm

20   sure would say to you, well, even under your

21   rule, you're going to have to go look at old

22   sentencing guidelines, sentencing regimes, and

23   some people are going to be denied the benefit

24   of later-enacted revisions to the schedule, you

25   know, reducing penalties under the schedule

1   between the time of federal conviction and

2   federal sentencing.

3   What do you say to those two

4   complaints from -- your -- your friend would

5   otherwise agree, I'm sure, with almost

6   everything you're saying?

7   MR. ADLER: Well, we would have no

8   problem, of course, with the time of sentence --

9   JUSTICE GORSUCH: I -- I -- I know you

10   wouldn't. I -- I got that. That wasn't my

11   question.

12   MR. ADLER: Sure, Your Honor. So I

13   just don't think that is consistent with notice

14   principles that we typically use in criminal

15   law. We're looking at notice when someone

16   commits the crime. That's how it's always done.

17   JUSTICE GORSUCH: But there's still

18   going to be the practical problem you just

19   talked about so well of looking at old -- old

20   sentencing rules.

21   MR. ADLER: No, Your Honor, because

22   that's a key difference between the -- our rule

23   and the government's rule.

24   JUSTICE GORSUCH: I get it's better

25   than the government's rule, but I'm sure Mr.

1   Green would say it's still worse than his from

2   that perspective.

3   MR. ADLER: Your Honor, I actually

4   don't think so because, in a -- because, for a

5   time-of-sentencing rule, you're going to have to

6   look at not just the federal schedules from the

7   time of offense but -- from the time of

8   sentencing but also from the time of offense to

9   make sure there's no ex post facto problem if

10   substances are added in the intervening period.

11   So our rule, it's a single contemporaneous

12   schedule. That's it.

13   JUSTICE GORSUCH: Okay. I appreciate

14   that response. And your time is up. I got one

15   more question for you later.

16   MR. ADLER: Thank you.

17   CHIEF JUSTICE ROBERTS: Thank you,

18   counsel.

19   Justice Thomas?

20   Justice Alito?

21   Justice Sotomayor?

22   Justice Kagan?

23   JUSTICE ALITO: Would you say -- no, I

24   --

25   CHIEF JUSTICE ROBERTS: Sorry.

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1                   JUSTICE ALITO:  -- I did have a

2       question, Chief.

3                   CHIEF JUSTICE ROBERTS:  Yes.

4                   JUSTICE ALITO:  Would you say that

5       someone who -- I -- I assume that in your

6       district and the other districts of Florida

7       there have been lots of convictions for

8       possession with intent to distribute huge

9       quantities of cocaine.

10                  Would you say that's correct?

11                  MR. ADLER:  Huge?  Perhaps.

12                  JUSTICE ALITO:  Large quantities?

13                  MR. ADLER:  Sure.

14                  JUSTICE ALITO:  Ten kilos, 20 kilos?

15                  MR. ADLER:  Well, I don't want to

16      agree to that, Your Honor, but --

17                  JUSTICE ALITO:  There haven't been --

18                  MR. ADLER:  -- large quantities, sure.

19                  JUSTICE ALITO:  -- there haven't been

20      -- there haven't been cases in Florida involving

21      that?

22                  MR. ADLER:  I -- I'm sure there have,

23      Your Honor.

24                  JUSTICE ALITO:  All right.  Would you

25      say that somebody who was convicted of such an
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1   offense in 2012 committed a serious drug

2   offense?

3   MR. ADLER: A federal offense or a

4   state offense?

5   JUSTICE ALITO: A state offense.

6   MR. ADLER: A state offense in 2012

7   for --

8   JUSTICE ALITO: Yes.

9   MR. ADLER: -- possession with intent

10   to distribute cocaine?

11   JUSTICE ALITO: Yes, yes.

12   MR. ADLER: Under our view, that would

13   not -- in Florida at least, that would not

14   qualify. However, I want to emphasize --

15   JUSTICE ALITO: That -- that would not

16   qualify because the Florida schedule at that

17   time included this drug, 123 Ioflupane?

18   MR. ADLER: That is --

19   JUSTICE ALITO: That's why?

20   MR. ADLER: -- that is correct.

21   JUSTICE ALITO: And when these people

22   were arrested for possession of 10 kilos, I

23   mean, 10 kilos wasn't a lot in New Jersey when I

24   was -- when I was a U.S. Attorney there. That

25   was our -- our minimum for prosecuting. I think

1 you must have had bigger cases than that.

2   But let's say 20 kilos. Somebody's

3 arrested for 20 kilos of -- of cocaine. Is

4 there any realistic possibility that this is 20

5 kilos of Ioflupane?

6   MR. ADLER: Your Honor, the government

7 has not made any sort of argument like that in

8 this case. This is a function of the

9 categorical approach. We're just asking the

10 Court to faithfully apply that approach in this

11 case as it always does in all of its cases.

12   And if I can say one more thing about

13 the Florida schedules, I want to be clear, that

14 in July 2017, Florida de-scheduled this

15 substance. It followed the feds. And so this

16 is a time-limited rule.

17   Moving forward, Florida convictions

18 for cocaine postdating July '17 would not have

19 the same overbreadth problem that we are

20 identifying here. And states routinely follow

21 the federal government when they de-schedule

22 substances. So it's a time-limited rule. And

23 it's not going to knock out all Florida cocaine

24 convictions or anything like that.

25   JUSTICE ALITO: Well, which ones will

1   it not knock out?

2   MR. ADLER: It would not knock out

3   Florida cocaine convictions post-dating July

4   2017 because there would be no overbreadth that

5   we are identifying.

6   JUSTICE ALITO: Yeah, but all the ones

7   before that are knocked out. Should we consider

8   -- should we put out -- put the categorical

9   approach out of our mind in -- out of our minds

10   in considering what Congress intended?

11   MR. ADLER: I -- I'm not sure how the

12   Court can -- can do that. I mean, the Court has

13   held that the categorical approach is a

14   by-product of Congress's intent in the statute.

15   It's held that for over 30 years. So I'm not

16   sure how the Court could put it out of its mind.

17   And, of course, the government is not

18   asking you to do anything like that. There's

19   been no dispute about how the categorical

20   approach applies in this particular case at any

21   stage of this litigation.

22   JUSTICE ALITO: So, if we -- if we

23   believe that Congress must have had the

24   categorical approach in mind because that's what

25   we said in Taylor and subsequent cases when it

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 1    enacted the ACCA provision at issue here, what

 2    does that do to your argument?

 3              MR. ADLER:  I think it means that we

 4    win, Your Honor, because we win under the

 5    categorical approach in this case, and that was

 6    -- has been around, as you said, since Taylor,

 7    since 1990.  So there's just no dispute about

 8    how it applies in this particular case.

 9              JUSTICE ALITO:  Thank you.

10              CHIEF JUSTICE ROBERTS:  Justice

11    Sotomayor?

12              Justice Kagan?

13              JUSTICE KAGAN:  Mr. Adler, could you

14    speak to the distinction between federal prior

15    convictions and state prior convictions and why

16    it would be that they would be two rules, that

17    the federal predicates would operate with the

18    old drug schedules and the state predicates

19    would operate with the new drug schedules?

20              MR. ADLER:  Sure.  Of course.  So of

21    -- we do not believe that is the correct

22    interpretation of (e)(2)(A)(i) for the reasons

23    we explain in our brief.

24              JUSTICE KAGAN:  Okay.  Let's say that

25    I don't accept that argument and I think that
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1   the -- the federal provision is pretty clear

2   that -- that there's no categorical approach

3   going on and that it would be the old schedules.

4   MR. ADLER: Sure. So two points on

5   that. The reason, as we explain on page 17 of

6   our reply brief, one possible reason at least,

7   is that when you are doing the federal analysis,

8   it's easy to just look at the statute of

9   conviction. There's no notice problem. There's

10   no administrability problem. You look at the

11   judgment and say: Was this person convicted

12   under the CSA? Easy.

13   You can't do that for state priors

14   because there's -- you know, you can't enumerate

15   all the state statutes. So what Congress has

16   done, it has looked to evolving federal drug

17   schedules. That was the only criteria -- that

18   was the federal criteria they chose. And as I

19   was explaining before, it is incredibly

20   difficult and problematic for notice purposes

21   for people to have to go all the way back,

22   decades earlier, to the time of their state

23   offenses to identify the federal drug schedule.

24   So that's one --

25   JUSTICE KAGAN: So this is why I asked

         1   whether you were making the notice argument as a

         2   constitutional argument or, instead, just as a

         3   key to statutory intent, because it's not clear,

         4   right, that Congress in enacting statutes always

         5   wants to give the best notice possible to

         6   criminal defendants.

         7   MR. ADLER: That may be right, Your

         8   Honor. We're not making a full-throated due

         9   process violation argument. I think the canon

        10   of constitutional avoidance, though, may well

        11   come into this at some point if we're requiring

        12   ordinary people to go back decades and decades.

        13   And the second point I wanted to make

        14   on the (e)(2)(A)(i) point is the Court

        15   absolutely does not have to interpret that

        16   provision to resolve this case in our favor

        17   because the Court should simply say the exact

        18   same thing it said in Shular on page 786. The

        19   Court unanimously said that the divergent text

        20   of the two definitions renders any divergence

        21   unremarkable, and that was quoting the

        22   government's own brief in that case.

        23   The exact same logic applies here.

        24   And, in fact, in Shular, we -- the only question

        25   was whether (e)(2)(A)(ii) referred to offenses

1   or conduct. And everybody agreed that

2   (e)(2)(A)(i) referred to offenses. And the

3   Court still said we don't care, the text is

4   different, it's referring to conduct in

5   (e)(2)(A)(ii). The same logic would apply here.

6   It's just different text. Thank you.

7   JUSTICE KAGAN: Thank you, Mr. Adler.

8   CHIEF JUSTICE ROBERTS: Justice

9   Gorsuch?

10   JUSTICE GORSUCH: Just to finish up

11   where we left off, suppose the schedules are

12   revised after the time of federal conviction. I

13   understand that if they were increased -- if a

14   new drug were added, you would say ex post facto

15   violation.

16   But, if a drug is removed, I think Mr.

17   Green would say the defendant should get the

18   benefit of that. You disagree? I -- I want to

19   understand why.

20   MR. ADLER: We -- we don't disagree

21   because, of course, we would prevail under time

22   of sentencing.

23   JUSTICE GORSUCH: No, I -- I -- I --

24   MR. ADLER: But --

25   JUSTICE GORSUCH: -- I got that

1   argument.

2   MR. ADLER: -- if you're using a

3   time-of-offense rule that we are advocating

4   here, then I think that's where the federal

5   saving statute would come into play. And so

6   Congress would really have to speak clearly to

7   overcome the presumption in the federal saving

8   statute that we apply the penalties in effect at

9   the time of the offense, and that is what this

10   Court in Dorsey referred to as "an important

11   background principle of interpretation."

12   So I don't want to fight you too hard

13   on that, but if we are operating under a

14   time-of-offense rule, then, yes, that would --

15   you would not get the benefit of that.

16   JUSTICE GORSUCH: You'd take the

17   bitter with the sweet?

18   MR. ADLER: Correct, Your Honor.

19   JUSTICE GORSUCH: Got it. Thank you.

20   CHIEF JUSTICE ROBERTS: Justice

21   Kavanaugh?

22   JUSTICE KAVANAUGH: I just want to

23   make sure I understand your notice point. At

24   the time of his first serious drug offense,

25   let's say, or someone's first serious drug

1   offense, you know, okay, I can't possess a

2   firearm. 922(g). Then you commit another

3   serious drug offense. Still 922(g). Then you

4   commit a and are convicted of a third serious

5   drug offense that qualifies, and you know at

6   that time, okay, I can't possess a firearm and

7   I'm subject to a 15-year mandatory minimum if I

8   do so.

9   You have all the notice you want at

10   that point even if there are later changes to

11   the federal drug schedule. So I don't

12   understand any notice problem.

13   MR. ADLER: Your Honor, the notice is

14   not applied at the time of the prior conviction.

15   If it was, again, there would be an ex post

16   facto problem for convictions that predate the

17   enactment of the recidivist statute, and that

18   can't be right.

19   But, practically too, people are not

20   on notice at the time of their prior proceeding.

21   They are not thinking about ACCA. Their lawyers

22   do not have to advise them about ACCA. People

23   are just dealing with the state case at that

24   time. So to say that people have notice of ACCA

25   when they haven't even committed a 922(g)

1   offense yet, ACCA does not become legally

2   relevant in any way until someone commits the

3   922(g) offense.

4   That is when the penalties are

5   incurred. That is when we are assessing notice,

6   not at the time of the prior conviction.

7   JUSTICE KAVANAUGH: Thank you.

8   CHIEF JUSTICE ROBERTS: Justice

9   Barrett?

10   Justice Jackson?

11   JUSTICE JACKSON: So the thing I'm

12   struggling with with your argument is that you

13   say that we ordinarily apply the penalties in

14   effect at the time of the offense, which I

15   understand. But I guess, in the context of this

16   exercise, I thought what the statute was

17   requiring courts to do was to essentially

18   classify or categorize a past offense.

19   So the court is today trying to impose

20   sentence, today trying to determine if 15 years

21   should be added, and Congress directs them to do

22   so by looking at this person's rap sheet and

23   determining if there are "serious drug offenses"

24   there.

25   What is hard for me is trying to

1   understand why that classification is in any way

2   related to the time of the ACCA offense. I get

3   clearly Mr. Green's situation because he says

4   you're doing that classification today, and so

5   what counts as a serious drug offense should be

6   made relative to what we would think is serious

7   now by looking at the schedules now.

8   And the government I get because they

9   say: Well, when you're looking back at that

10   offense, those offenses in the rap sheet, you

11   should at least consider or it should be

12   determined by what was serious then, right, what

13   was on the schedule at that time.

14   Your position, I'm trying to

15   understand how it relates to the exercise of

16   classifica -- classifying this as a serious drug

17   offense.

18   MR. ADLER: Thank you, Your Honor. So

19   let me try to explain it this way. This Court

20   has a long line of precedents about recidivist

21   statutes, and they all say the same thing, that

22   recidivist statutes punish the latest offense of

23   conviction, which is here the 922(g) offense.

24   The government, by the way, ignores this line of

25   precedent. Talking about Gryger versus Burke,

1   Nichols, Whitt, Bryant, and Rodriquez, which is

2   an ACCA decision.

3   And so our point is that you're not

4   looking at someone's culpability at the time

5   they commit the prior. That -- the state court

6   has already sentenced them based on that

7   understanding of culpability. You're sentencing

8   them for what they have done at the time they

9   commit the 922(g) offense.

10   And the government's sort of contrary

11   logic would prove too much because let's go back

12   again to the burglary hypothetical. In that

13   situation, someone commits a --

14   JUSTICE JACKSON: Yes, I understand

15   the government. What about Mr. Green's point?

16   MR. ADLER: Again, we -- we would have

17   no problem if the Court goes that way, but I

18   think we have -- we are punishing the 922(g)

19   offense, and this is how we always calculate

20   statutory penalties in the law. We're looking

21   at what were the penalties at the time the

22   person committed the crime. Theoretically,

23   those penalties are what could deter someone

24   from committing --

25   JUSTICE JACKSON: No, I understand.

1   MR. ADLER: -- that crime in the first

2   place.

3   JUSTICE JACKSON: But we're -- but

4   it's not relevant to the exercise -- this --

5   this is an exercise that is embedded in a

6   definition of "serious drug offense," which is,

7   I think, what is the ultimate goal. We're

8   assessing whether or not these prior things were

9   a serious drug offense.

10   Your argument is just, you know, if we

11   were sentencing without that sort of

12   definitional overlay, then we would do so based

13   on what happened with respect to the ACCA crime.

14   But I guess I'm just confused about the

15   definition of "serious drug offense" and how it

16   has any bearing on your rationale.

17   MR. ADLER: So, Your Honor, I don't

18   think there's any question that the statutory

19   penalties in ACCA are incurred the moment

20   someone commits the crime. That is the crime

21   that we are punishing here, right?

22   So we have to then view -- this is why

23   the government agrees, we look at the version of

24   ACCA in effect at the time of the crime, not at

25   the time of sentencing, at the time of the

1   crime. And then the question again comes back

2   to where we began, which is, well, why are we

3   going to look to all of the criteria in ACCA in

4   effect at the time of the crime, not sentencing,

5   at the time of the crime, but carve out --

6   JUSTICE JACKSON: Yeah.

7   MR. ADLER: -- this one exception?

8   JUSTICE JACKSON: Thank you.

9   MR. ADLER: Thank you.

10   CHIEF JUSTICE ROBERTS: Thank you,

11   counsel.

12   Mr. Raynor.

13   ORAL ARGUMENT OF AUSTIN RAYNOR

14   ON BEHALF OF THE RESPONDENT

15   MR. RAYNOR: Mr. Chief Justice, and

16   may it please the Court:

17   To determine whether a prior state

18   conviction qualifies as a predicate under the

19   Armed Career Criminal Act, courts should consult

20   the federal drug schedules in effect at the time

21   of that conviction. That rule flows from the

22   ACCA's text. As this Court recognized in

23   McNeill, the ACCA establishes a sentencing

24   enhancement for defendants with previous

25   convictions involving drugs listed on the

1   federal schedules.

2   That language dictates a

3   backward-looking inquiry that requires courts to

4   assess the attributes of a prior conviction at

5   the time that it occurred.

6   Critically, the ACCA treats both

7   federal and state convictions as predicates.

8   Under subclause 1, which unambiguously requires

9   courts to consult the federal drug schedules in

10   effect at the time of the prior conviction,

11   there's no question about this. Courts have to

12   look to the past.

13   The same rule should apply to

14   subclause 2. A -- a prior federal conviction

15   would not disappear for ACCA purposes simply

16   because the drug schedules were later amended to

17   remove the relevant controlled substance. And

18   there's no reason to treat state crimes

19   differently when they involve the same culpable

20   conduct and the same regulated drug.

21   Rather than engage with the statutory

22   text, Petitioners rely exclusively on purported

23   background rules of interpretation. Jackson,

24   most significantly, argues that courts should

25   apply the federal criminal law in effect at the

 1   time of the federal offense conduct. But the

 2   government agrees the version of the ACCA in

 3   effect at the time of the federal offense

 4   conduct is what controls here.

 5   The question in this case is which

 6   version of the federal drug schedules the ACCA's

 7   cross-reference specifies, and Jackson's

 8   interpretive principle does not answer that

 9   question.

10   Just as in McNeill this Court

11   recognized that the ACCA points courts to the

12   prior version of state law in effect at the time

13   of the state conviction, so too it points courts

14   to the version of the federal drug schedules in

15   effect at that same time.

16   This Court should affirm the judgments

17   below.

18   JUSTICE THOMAS: If we -- rather than

19   looking at an underlying drug schedule, if the

20   statute itself was amended, would your analysis

21   be the same?

22   MR. RAYNOR: No, Justice Thomas. We

23   acknowledge that if the ACCA included a static

24   list of substances, so if appended to this

25   provision there was just a list of substances,

1   cocaine, marijuana, and so forth, an amendment

2   to that list would apply at the time of the

3   federal offense conduct. We think the

4   cross-reference to an external body of law that

5   is dynamic is critical here.

6   And in our view, the cross-reference

7   raises a temporal question. When Congress

8   chooses to reference an external body of law,

9   that raises the question, which version of that

10   body of law is Congress intending to reference?

11   And we think the temporal question is

12   particularly --

13   JUSTICE SOTOMAYOR: I -- I'm not sure

14   why. I -- I'd like you to concentrate on

15   Justice Thomas's point. I think this is the

16   most serious weakness in your argument because

17   it doesn't make much sense to me. You take --

18   when you're cross-referencing something, you're

19   taking everything with it.

20   You're picking and choosing and now

21   saying I'm only going to take a piece of it, not

22   all of it.

23   MR. RAYNOR: To be clear, Justice

24   Sotomayor, we agree you're looking at all the

25   federal schedules. We're not only taking a

 1   piece of the schedules. The question is simply

 2   which version of the schedule -- schedules. And

 3   as the Court discussed in Jam --

 4   JUSTICE GORSUCH: I think -- I think

 5   the question, though, is normally when we have a

 6   cross-reference, we look at the contemporaneous

 7   version of the cross-reference. I -- I think

 8   that's -- I think that's Mr. Jackson's primary

 9   argument. And the -- and the statutory text

10   here says "as defined in," which suggests we

11   look at the present law, just as we normally

12   would, just as you concede we -- a moment ago

13   that we normally would.

14   What -- what in the text suggests this

15   backward-looking approach that you want to put

16   into it?

17   MR. RAYNOR: Yes, Justice Gorsuch.

18   JUSTICE GORSUCH: In -- in the text.

19   MR. RAYNOR: So, in the text, we think

20   the cross-reference raises the temporal question

21   and the context answers the temporal question.

22   JUSTICE GORSUCH: How? "As defined

23   in." Those are --

24   MR. RAYNOR: Right.

25   JUSTICE GORSUCH: -- those are the

1   only terms that we have to work with.

2   MR. RAYNOR: So, as the Court

3   explained in McNeill, I don't think the present

4   tense does a lot of work here because this is a

5   backward-looking statute. I disagree that the

6   background rule is that we always look to the

7   contemporaneous referenced law.

8   As the Court discussed in Jam, the

9   reference canon actually supplies the background

10   rule here, and the reference canon has temp --

11   different temporal branches depending on

12   context. The reason the reference canon is

13   structured that way is because cross-references

14   may refer to past law --

15   JUSTICE GORSUCH: Of course.

16   MR. RAYNOR: -- they may refer to the

17   present law.

18   JUSTICE GORSUCH: And, in fact, in

19   (h), we have such a thing. We don't here. We

20   just has -- we have "as defined in," not "as was

21   once defined" or "as at the time of state

22   conviction" or "as had been." Lots of

23   alternatives I can come up with that would

24   accomplish exactly what you want and, in fact,

25   appear elsewhere in the statute but not here.

 1   MR. RAYNOR: I agree all of those

 2   formulations would answer the question

 3   dispositively. In our view, there's three

 4   aspects of the text that dictate a

 5   backward-looking inquiry. There's the term

 6   "previous convictions," there's the term

 7   "involving," which we think refers to historical

 8   attributes of an offense, and, third, there is

 9   subclause 1, which unambiguously requires a

10   backward-looking inquiry.

11   JUSTICE GORSUCH: For sure. We ask

12   backward-looking inquiry when we're saying do

13   you have these things, these prior convictions.

14   But, when we're asking what is a controlled --

15   what is a serious drug offense, that's defined,

16   that's the section that we're now dealing with.

17   So what do we -- what do we do with that?

18   MR. RAYNOR: It -- it's true that

19   subclause 1 is separate from this, but "previous

20   convictions" is an umbrella term that informs

21   the meaning of everything that follows.

22   "Involving" is actually in the clause that's at

23   issue here. "Involving" is followed by a list

24   of attributes of the prior state offense. And

25   "as defined in the federal schedules" is part of

 1   that list.

 2   I think both of those textual pieces

 3   still apply in this case.

 4   JUSTICE GORSUCH: And just shifting

 5   gears, your -- your colleagues on the other side

 6   raised an ex post facto concern. What -- what

 7   is the government's analysis of that? Is there

 8   an ex post facto concern? If not, why not?

 9   MR. RAYNOR: We agree that there's an

10   ex post facto problem with Mr. Brown's

11   interpretation because anytime a drug is added

12   to the schedules after the federal offense

13   conduct --

14   JUSTICE GORSUCH: No, no, I'm -- I'm

15   saying with respect to your interpretation. If

16   we accept the state offense time, there are

17   going to be some drugs that will be added

18   later --

19   MR. RAYNOR: Correct.

20   JUSTICE GORSUCH: -- inevitably.

21   MR. RAYNOR: Yes.

22   JUSTICE GORSUCH: It's just the way

23   the world works these days. And your colleagues

24   on the other side say, well, that poses a

25   serious ex post facto concern with your

 1   interpretation.

 2   And we're going to inevitably invite a

 3   number of ex post facto challenges, and I'm sure

 4   the government's given that thought, and I just

 5   want to know what you think the merits of that

 6   argument might be.

 7   MR. RAYNOR: We do not think there is

 8   any merit to that argument. And I actually

 9   don't understand it -- them to be arguing that

10   our position would create an ex post facto

11   violation because we --

12   JUSTICE GORSUCH: Let's suppose I

13   understand that to be their argument. Then

14   what?

15   MR. RAYNOR: Then I -- I still

16   disagree that there would be such a problem

17   because we agree that the ACCA in effect at the

18   time of the federal offense conduct governs. Up

19   until that point, the defendant can choose to

20   possess a firearm or not to possess a firearm,

21   so there's nothing retroactively being imposed

22   on prior conduct.

23   The prior convictions here are used to

24   help ascertain the seriousness of the offense,

25   how dangerous this defendant is, but,

1   ultimately, he's still being punished for the

2   gun possession, which is the 922(g) violation.

3   JUSTICE GORSUCH: Well -- well, again,

4   but the serious drug offense changes on -- on

5   your view, it's -- we said it at the time of

6   state conviction, but the schedules are dynamic,

7   as you point out, and -- and it's going to lead

8   some individuals to be punished under -- under

9   your reading who would not otherwise be

10   punished.

11   And I guess I'm just trying to

12   understand, again, do you think that's an ex

13   post facto problem? If not, why not?

14   MR. RAYNOR: I think the only way that

15   there would be an ex post facto problem is if

16   they were being punished for additions to the

17   schedules after their 920 --

18   JUSTICE GORSUCH: Yeah.

19   MR. RAYNOR: -- 922(g) offense.

20   JUSTICE GORSUCH: That's what I'm

21   asking about.

22   MR. RAYNOR: And that's not the case

23   under our interpretation. Under our

24   interpretation, you look to the schedules in

25   effect at the time of their prior state offense.

 1   It's locked in at the earliest possible time of

 2   all the three.

 3   JUSTICE KAVANAUGH: It's only -- it's

 4   only Brown's interpretation that would create an

 5   ex post facto problem. Neither Jackson's nor

 6   yours would create any ex post facto issues as I

 7   understood it.

 8   Is that your understanding?

 9   MR. RAYNOR: That is also my

10   understanding.

11   JUSTICE BARRETT: Mr. Raynor, I'd like

12   you to address the difficulty or, you know, the

13   lack of access to the prior drug schedules,

14   because I think that might be a problem with

15   your approach from an administrability point of

16   view.

17   MR. RAYNOR: Yes. So, Justice

18   Barrett, if we're talking about defendants, I

19   think they paint this sort of artificial

20   portrait that defendants at the time of their

21   state convictions will be totally unaware of the

22   federal schedule. I think that ignores an

23   important part of how the statute works.

24   The statute picks up federal

25   convictions and analogous state convictions. So

 1   state convictions involving federally prohibited

 2   conduct, like manufacturing, distributing, or

 3   possessing with intent to do those things, a

 4   federally controlled substance.

 5   If you're a defendant who has

 6   trafficked in a federally controlled substance,

 7   you're going to be very interested in your

 8   federal exposure at the time even if you're

 9   being prosecuted by state authorities --

10   JUSTICE BARRETT: No, I understand

11   that from a notice point of view, and, in fact,

12   I think it would be more difficult for

13   defendants who can't predict if the schedules

14   are going to change later and not know whether

15   their offense would be a predicate. I -- I

16   understand that.

17   I'm just saying, at the time of

18   sentencing for everyone, for the prosecutor, for

19   the district judge, for the defendant who after

20   the ACCA offense is committed has to figure out

21   does this predicate count, how do you find the

22   schedules? You know, so --

23   MR. RAYNOR: I think part of it is you

24   rely on the attorneys. Like, you know, the

25   relevant scheduling changes are well-known to

1   both sides of the bar in Florida. It's

2   Ioflupane and hemp. I think they're overstating

3   the degree to which this will be a practical

4   problem.

5   But, to the extent you were worried

6   about it, our position doesn't create any

7   greater practical problems than McNeill already

8   requires. McNeill is going to require you to go

9   back and look at the state code in effect at the

10   time.

11   JUSTICE BARRETT: Well, the state code

12   might be easier to find. I mean, how often do

13   the drug schedules change at the federal level?

14   MR. RAYNOR: I -- Justice Barrett, I'm

15   not sure that it will be easier to find because

16   you won't just be able to look at the conviction

17   documents, right? To conduct the categorical

18   inquiry, you're often going to have to pull old

19   state drug schedules, which is going to be much

20   harder to find than old federal drug schedules.

21   You're also going to have to pull old

22   versions of the state code to determine what the

23   maximum applicable punishment was because the

24   punishment to which you were sentenced might not

25   answer the question.

1   JUSTICE BARRETT: Are the old federal

2   drug schedules hard to find?

3   MR. RAYNOR: It depends on what type

4   of -- what -- what you're looking for. So,

5   here, if we're talking about cocaine, cocaine

6   has been scheduled since the beginning. If you

7   look at the prior -- the modern definition of

8   cocaine, there's an exemption for Ioflupane.

9   You can discover that Ioflupane was de-scheduled

10   in 2015 via a Google search. So the -- the

11   argument presented here --

12   JUSTICE SOTOMAYOR: I -- I --

13   MR. RAYNOR: -- is just not difficult

14   to --

15   JUSTICE SOTOMAYOR: Assuming I accept

16   that there's a burden -- I know you're saying

17   there's not and the Chief suggested there might

18   not be. I accept it because I think every

19   prosecution, probation officer, and defense

20   counsel in these various amicus tell us there's

21   a problem.

22   Who bears the burden of proving this

23   at sentence? I know that defense counsel says

24   we have to figure it out because we have to

25   advise our client. But, at the end, they're

1   just defending against a charge. Doesn't the

2   prosecutor bear the burden of proving it?

3   MR. RAYNOR: Correct. It's a

4   sentencing --

5   JUSTICE SOTOMAYOR: And if there's any

6   doubt, you don't -- are -- are you conceding on

7   behalf of the government that if there's a

8   doubt, it's in favor of the defendant and the

9   enhancement should not be given?

10   MR. RAYNOR: I don't concede that if

11   there is any doubt that the -- the -- the

12   defense automatically wins. This is --

13   JUSTICE SOTOMAYOR: Why?

14   MR. RAYNOR: In our view, this is a

15   sentencing factor that can be found by the

16   judge.

17   JUSTICE SOTOMAYOR: By a preponderance

18   of the evidence?

19   MR. RAYNOR: That question is not

20   presented here. I -- I don't want to get out

21   ahead of --

22   JUSTICE SOTOMAYOR: On a legal

23   question?

24   MR. RAYNOR: No, Justice Sotomayor,

25   I'm not suggesting that. All I was taking issue

 1   with was your suggestion that any doubt is

 2   enough to get the defendant off the hook. I

 3   agree the government is going to have to bear

 4   the burden on this and prove it and --

 5   JUSTICE SOTOMAYOR: So how would you

 6   want me to phrase that? It seems to me that if

 7   it's as difficult as is being suggested, if

 8   there is doubt, quantify how much doubt is

 9   enough to favor the defendant.

10   MR. RAYNOR: Justice Sotomayor, as I

11   said, the Sixth Amendment question is coming

12   before the Court soon. I don't want to get out

13   ahead of our briefing on that. I do think that

14   under Almendarez-Torres, this could be found

15   along with the fact of the prior conviction.

16   But I agree with you that this is something that

17   the government must carry its burden on.

18   And to get back to the burden question

19   --

20   JUSTICE SOTOMAYOR: By a preponderance

21   of the evidence on a legal question?

22   MR. RAYNOR: No -- no, Justice

23   Sotomayor. I think it -- it's likely that it's

24   beyond a reasonable doubt, but I'm not prepared

25   to take a position on that today.

 1   JUSTICE JACKSON: Can I just direct

 2   your attention to the kind of overall theory of

 3   this? Because I -- I'm, as usual, struggling

 4   with that.

 5   Do you concede that a change in the

 6   drug schedules reflects a change in what is

 7   considered to be a serious drug offense? In

 8   other words, to -- to -- to take a drug off the

 9   schedule, Congress has made a determination that

10   that's no longer a controlled substance. It's

11   not going to be something that we consider to be

12   a crime.

13   MR. RAYNOR: Justice Jackson, I

14   certainly agree that, going forward, that means

15   someone can't be punished for that. And a state

16   conviction, going forward, also would not be

17   treated as --

18   JUSTICE JACKSON: All right. So then

19   my question, I guess, is, why would Congress

20   want to incapacitate defendants who have

21   committed crimes that federal law no longer

22   regards as serious? I mean, I thought the point

23   of this was we're doing ACCA because we think,

24   Congress says, that certain people need to be

25   taken off the streets for a -- long periods of

1   time, and in order to identify those people, we

2   look at their histories and determine whether

3   they have committed certain kinds of crimes.

4   If we today, as we undertake

5   sentencing, have an understanding that these

6   certain kinds of prior crimes are no longer

7   considered serious because the change -- the --

8   the schedules have changed, I guess I'm trying

9   to understand why the government's position is

10   that they should still be ACCA predicates.

11   MR. RAYNOR: Right. The reason,

12   Justice Jackson, is because we think, in terms

13   of assessing the seriousness of the prior

14   offense, it makes sense to look at the legal

15   landscape at the time that the offense occurred.

16   JUSTICE JACKSON: Why? We're doing

17   the sentencing today --

18   MR. RAYNOR: Right.

19   JUSTICE JACKSON: -- and we're trying

20   to determine whether this person today needs to

21   be put in jail for 15 more years. So why does

22   the seriousness or the label or the perception

23   of the past as to what he did mattered? Why

24   wouldn't the criteria for determining that be

25   what we think about his prior crimes today?

1   MR. RAYNOR: It -- it's relevant to

2   his willingness to disregard the law. So, to

3   take Jackson as an example, he trafficked

4   cocaine in 1998 and 2004. That was considered a

5   very serious crime at the time. The fact that

6   there was later a medical use discovered for a

7   derivative of cocaine --

8   JUSTICE JACKSON: Yes. No, I

9   understand how it turns into a technicality in

10   the particulars of this case. But what I'm

11   saying is ACCA is not about punishing the person

12   for the past offense. He's already, you know,

13   been held responsible, culpable, sentenced for

14   the past offense.

15   I thought it was about incapacitating

16   people who we can identify as particularly

17   dangerous based on the nature of their past

18   offenses. So it's not really about his

19   willingness to -- to commit a crime. I mean, he

20   has these criminal offenses. Congress would

21   have just said, do you have an offense?

22   Instead, they say, do you have a serious drug

23   offense?

24   And what I am struggling with and

25   trying to get beyond is why we are evaluating

1   the seriousness of that offense based on past

2   standards as opposed to the standards that would

3   apply today as we're making this 15-year

4   determination.

5   MR. RAYNOR: Justice Jackson, I think

6   another way to come at this is this is

7   unambiguously what subclause 1 does. It cares

8   about the seriousness of the offense at the

9   time. It cares about whether you had a federal

10   conviction, even if --

11   JUSTICE JACKSON: Well, I -- I'm not

12   so sure about that. I mean, it doesn't -- it --

13   it too doesn't necessarily -- I'm trying to find

14   the statute. You know, it says an offense. It

15   doesn't say a conviction under the Controlled

16   Substances Act. And I appreciate that the

17   previous thing says you have to have three

18   previous convictions, right, but for a serious

19   drug offense, and then it says an offense under

20   the Controlled Substance Act.

21   I mean, one could interpret that also

22   with respect to modern standards because the

23   exercise is trying to identify what is a serious

24   drug offense. And if today we would say this is

25   not an offense under the -- the Controlled

1   Substances Act, I suppose we could interpret the

2   federal statute differently than what you're --

3   you're -- you're articulating, right?

4   MR. RAYNOR: I don't think so, Justice

5   Jackson. I think the text says, do you have a

6   previous conviction for an offense under the

7   Controlled Substances Act? If you have a

8   conviction for an offense under the Controlled

9   Substances Act, that's just the end of the

10   analysis.

11   JUSTICE JACKSON: But why -- why

12   couldn't it be today's Controlled Substance --

13   that's what I'm asking you. It would be -- it

14   wouldn't be an offense for the Controlled

15   Substances Act as it exists today.

16   MR. RAYNOR: No, but it -- it would be

17   literally a conviction under the Controlled

18   Substances Act. And, to be clear, it -- it -- I

19   am not aware of any court entertaining this

20   argument before, much less adopting it.

21   JUSTICE JACKSON: But it's also not at

22   issue in this case, right? We're doing the

23   other thing. We're doing --

24   JUSTICE KAVANAUGH: I thought --

25   JUSTICE JACKSON: Yeah.

 1   JUSTICE KAGAN: Mr. Raynor --

 2   JUSTICE KAVANAUGH: Sorry.

 3   JUSTICE KAGAN: I'm sorry. Go ahead.

 4   JUSTICE KAVANAUGH: Go ahead.

 5   JUSTICE KAGAN: No, you -- you were

 6   first.

 7   JUSTICE KAVANAUGH: Go ahead.

 8   CHIEF JUSTICE ROBERTS: Justice Kagan.

 9   (Laughter.)

10   CHIEF JUSTICE ROBERTS: Justice Kagan.

11   JUSTICE KAGAN: Can I take you back to

12   the conversation that you started having with

13   Justice Thomas? If -- if I understand your

14   responses to those questions, you agree with Mr.

15   Adler that if ACCA were amended so that burglary

16   was not a predicate, you would go with the new

17   version. Is that right?

18   MR. RAYNOR: The version in effect at

19   the time of the offense conduct, correct.

20   JUSTICE KAGAN: Correct. And same,

21   if, instead of this language, you had a list of

22   five controlled substances and those five

23   controlled substances were amended, again, the

24   same result would follow, correct?

25   MR. RAYNOR: I agree, yes.

 1   JUSTICE KAGAN: So -- so your whole

 2   argument rests on treating differently a list of

 3   five substances or any other attribute of ACCA,

 4   treating it differently from a controlled

 5   substance as defined in Section 102.

 6   And that seems a little bit mysterious

 7   to me. I mean, if you ask why it is that

 8   Congress put in this language, "a controlled

 9   substance (as defined in Section 102)," it's,

10   well, number one, there are lots of controlled

11   substances, and you don't want to have to list

12   all, however many there are. And, number two,

13   we expect them to change, so what's going to be

14   a controlled substance next year is not

15   necessarily the same as this year.

16   And so, on both of those theories of

17   why Congress used this language, it seems

18   perplexing as to why you would have a different

19   rule than you would if Congress had just listed

20   the substances.

21   MR. RAYNOR: Right. Justice Kagan, I

22   think one way to think about this is, if it had

23   listed the substances, that would reflect a

24   static concern with particular substances. But,

25   by referencing an external body of law, Congress

1 evinced its concern with the drug's status under

2 federal law.

3 And for the reasons I was discussing

4 with Justice Jackson, it makes a lot more sense

5 to look at the drug's status under federal law

6 at the time of the prior conviction.

7 JUSTICE KAGAN: I mean, I would think

8 quite the opposite, that what Congress is saying

9 when it does -- when it uses this kind of

10 language is we know this is going to be in flux,

11 so keep on updating, you know?

12 And -- and that's -- that's an

13 argument in Mr. Adler's favor, not in yours.

14 MR. RAYNOR: Right. So, Justice

15 Kagan, another way to come at this is that we

16 think the cross-reference -- as I mentioned to

17 Justice Gorsuch, it raises the temporal

18 question. When Congress puts in a

19 cross-reference, we know from the reference

20 canon there's multiple points in time it could

21 be referencing. There's no background rule that

22 it's always referencing current law.

23 So, in our view, the cross-reference,

24 it only raises the question. It doesn't answer

25 the question. We think what answers the

1   temporal question is subclause 1, the term

2   "previous convictions," the term "involving,"

3   and McNeill and this Court's precedent. It's

4   that text and context that in our view answers

5   the question in favor of the prior state

6   conviction ruling.

7   JUSTICE KAVANAUGH: Can -- can I ask

8   about, following up on Justice Jackson's

9   questions, how to think about this statute?

10   Because I think about it not as a purely

11   recidivist statute for recidivist drug offenses

12   but -- but as a gun statute.

13   Once you have the three prior offenses

14   for serious drug offenses or a violent felony,

15   you know, don't possess a firearm. In fact, if

16   you have one, you know don't possess a firearm.

17   Once you have three, don't possess a firearm or

18   you're getting a mandatory minimum because

19   Congress was concerned about guns with drugs,

20   not about drugs alone in this statute, about

21   guns with drugs, and that's why you look --

22   that's what Congress was concerned about.

23   MR. RAYNOR: Yes, Justice Kavanaugh.

24   I think that's an important response.

25   JUSTICE KAVANAUGH: So without -- it's

 1   not just the drugs. It's the gun.

 2   MR. RAYNOR: Right, exactly. And I

 3   think that's an important response to their --

 4   to their notice argument. As -- as you

 5   mentioned earlier in your questioning of my

 6   friend, as soon as the defendant receives that

 7   third conviction, he's going to know he cannot

 8   possess a gun going forward. That's not an

 9   inquiry for him to undertake 10 years later when

10   he decides to --

11   JUSTICE KAVANAUGH: Now the response

12   to that -- so I want you to respond to what

13   counsel said -- was not really, they don't

14   really pay attention to that, they're not

15   advised of that. So will you respond to that?

16   MR. RAYNOR: Yes. I -- I think

17   there's two responses to that. The first is

18   what I just said to you. It -- it inhibits

19   their behavior going forward because they know

20   one minute after that third conviction, if they

21   possess a gun, they're subject to the ACCA

22   enhancement.

23   JUSTICE KAVANAUGH: Alright.

24   MR. RAYNOR: And the other response I

25   think is what I mentioned to Justice Barrett

1   earlier, which is this statute picks up federal

2   convictions and analogous state convictions.

3   And if you trafficked in a federally controlled

4   substance, you're going to be highly aware at

5   the time of what your federal exposure is, even

6   if you end up being prosecuted under state law.

7   So that's the second reason the defendants will

8   care at the time.

9   All of that being said, we think even

10   if this is something that they researched later,

11   the burden -- they'll have to do that research

12   before possessing a firearm. We don't think

13   there's a problem even then, but we think the

14   other side overstates the degree to which the

15   defendant will be ignorant of federal schedules

16   at the time of the state conviction.

17   JUSTICE GORSUCH: Counsel, you, in

18   response to Justice Kagan, talking about the

19   reference canon, noted that sometimes it can

20   refer to a past law rather than present law.

21   But do you agree with the Court in Jam that a

22   general reference to an external body of law

23   takes that body of law as it evolves over time?

24   MR. RAYNOR: Justice Gorsuch, I agree

25   with that insofar as it's not fixed at the time

1   that the referring statute was enacted. We

2   don't think that the Jam Court had occasion to

3   get to the level of specificity required to

4   resolve this case.

5   So every party in -- in -- in here at

6   least --

7   JUSTICE GORSUCH: Let me just

8   interrupt you there, I'm sorry. "When a statute

9   refers to a general subject, the statute adopts

10   the law on that subject as it exists whenever a

11   question under the statute arises."

12   There's other language too. I mean, I

13   can -- the reference is to an external body of

14   potentially evolving law. So that's the general

15   rule this Court has adopted.

16   And -- and it's for you to overcome

17   that general presumption, isn't it?

18   MR. RAYNOR: I don't think so, Justice

19   Gorsuch. The Court actually articulated two

20   branches of the canon. It said, if there's a

21   reference to a general body of law, it evolves.

22   JUSTICE GORSUCH: The --

23   MR. RAYNOR: If there's a reference to

24   a --

25   JUSTICE GORSUCH: -- specific --

         1   MR. RAYNOR: -- specific provision --

         2   JUSTICE GORSUCH: -- can sometimes be

         3   fixed, sometimes, but generally, if there's

         4   reference to a general body of law, the rule is,

         5   always an exception, that -- that it takes it as

         6   it finds it.

         7   MR. RAYNOR: Yes. I think on its face

         8   the canon here would suggest it's fixed because

         9   this is a specific reference. All the parties

        10   agree that that is overcome here.

        11   I think, once the implication of the

        12   canon is overcome, the Court should just look to

        13   Congress's intent without further reference to

        14   the canon. It should just ask, what did

        15   Congress intend here? And for the textual

        16   reasons you and I discussed earlier.

        17   JUSTICE GORSUCH: Yeah. Okay.

        18   MR. RAYNOR: And I will say, even if

        19   you think that this falls within the dynamic

        20   prong of the reference canon --

        21   JUSTICE GORSUCH: Yeah.

        22   MR. RAYNOR: -- all of the parties

        23   agree that the schedules evolve and that this

        24   statute does not reference the schedules as they

        25   existed at the time of the ACCA's enactment.

1   The question is which of our dynamic reference

2   points is correct --

3   JUSTICE GORSUCH: That's interesting.

4   MR. RAYNOR: -- and I don't think -- I

5   don't think that --

6   JUSTICE GORSUCH: Yeah. So you -- you

7   concede that it's dynamic too, but just it stops

8   at a certain point?

9   MR. RAYNOR: We concede it's not fixed

10   at the time, correct. I -- I don't concede that

11   that branch of the canon necessarily applies,

12   but, if you thought that it did, I don't think

13   it supplies the requisite granularity to figure

14   out which of the dynamic points that we're

15   arguing about is correct.

16   And this is evidenced by the fact that

17   both Mr. Jackson and Mr. Brown claim that the

18   reference canon supports their position even

19   though they have different positions.

20   JUSTICE GORSUCH: Thank you.

21   JUSTICE SOTOMAYOR: What do I do -- I

22   found it curious that the government argued for

23   a time-of-federal-offense approach in the court

24   of appeals in Brown. It's now changed its

25   position -- it wasn't the solicitor general

 1   making the argument down there. You're entitled

 2   to raise any argument you want.

 3   But it does suggest to me that there

 4   is a reading of this statute that comports with

 5   Mr. Jackson's approach.

 6   MR. RAYNOR: Justice Sotomayor, just

 7   to clarify, the -- the Brown briefs were filed

 8   at a time when this issue was just arising. It

 9   was very much in flux. And the government

10   offered the Third Circuit the saving statute

11   approach as a narrow way to resolve the case

12   because Mr. Brown would lose under either a

13   time-of-federal-offense rule or a

14   time-of-state-crime rule.

15   JUSTICE SOTOMAYOR: He only wins under

16   his current rule, yeah.

17   MR. RAYNOR: And -- and we -- we

18   include in Footnote 3 of our court of appeals

19   brief reserves the time-of-state-crime rule for

20   cases where it might matter.

21   JUSTICE SOTOMAYOR: Okay.

22   MR. RAYNOR: But --

23   JUSTICE BARRETT: Why is this issue

24   only arising now?

25   MR. RAYNOR: That's a good question,

 1   Justice Barrett. I'm not sure about the answer.

 2   It -- it may be that we've had more major

 3   de-scheduling recently than we did in -- in the

 4   -- the first, you know, 20 or 30 years of the

 5   ACCA's existence, but, to my knowledge, this has

 6   really only started to arisen in the past two or

 7   three years.

 8   If I may for a moment just talk about

 9   Mr. Jackson's background rule. He says courts

10   always apply current federal criminal law at the

11   time of the offense conduct. It's important to

12   note that that rule doesn't exist in the

13   abstract. He draws it from three separate

14   bodies of law.

15   He -- he amalgamates it first from the

16   Ex Post Facto Clause, which says that post

17   offense changes that make the offense more

18   culpable don't apply retroactively. That rule

19   obviously doesn't implicate our position here.

20   Second, he -- he draws it from the

21   saving statute, which says that post offense

22   changes that make the conduct less culpable also

23   don't apply retroactively. Again, that sheds no

24   light on our position here.

25   And, third, he draws it from the

1   logical point that if you commit an act that's

2   not a crime at the time, you haven't committed a

3   crime. So, if Congress passes a law that says

4   you shall not murder, they repeal that law, and

5   two days later you commit a murder, you simply

6   have not violated any law. Again, that doesn't

7   shed any light on our position here, which

8   depends on ascertaining the seriousness of a

9   predicate conviction.

10   JUSTICE JACKSON: So, in -- in that

11   situation, Congress repeals a federal statute,

12   let's say we're looking at the federal prong and

13   you commit federal crimes under the Controlled

14   Substances Act at the time, and then Congress

15   repeals that portion of the Controlled

16   Substances Act.

17   Is the government's position that it

18   would still be ACCA -- ACCA predicate?

19   MR. RAYNOR: Justice Jackson, if I'm

20   understanding you correctly, if you were

21   convicted of a CSA offense --

22   JUSTICE JACKSON: Yes.

23   MR. RAYNOR: -- Congress later

24   repealed that aspect of the CSA, but it didn't

25   make the change retroactive -- retroactive, so

1   your conviction is still on the books?

2   JUSTICE JACKSON: Yes.

3   MR. RAYNOR: Yes, that would qualify

4   as an ACCA predicate.

5   In -- my point in discussing the --

6   the sources of this background rule is to show

7   that when you reduce it to it -- these sources,

8   none of them shed any light on the question in

9   this case.

10   To say that courts apply current

11   federal law and, therefore, the cross-reference

12   points to the current federal schedules is

13   entirely question-begging. It assumes the

14   conclusion.

15   CHIEF JUSTICE ROBERTS: Thank you,

16   counsel.

17   Justice Thomas?

18   JUSTICE THOMAS: Mr. Raynor, just so

19   I'm clear, you do take the position that if the

20   statute itself had been -- if ACCA had been

21   amended to change the schedule, if it was more

22   dynamic, that it would -- Petitioners would win?

23   MR. RAYNOR: Justice Thomas, we agree

24   that if the drugs were listed in the text of

25   ACCA and that drug list was modified, Mr.

1   Jackson's rule would apply.

2   JUSTICE THOMAS: Now this seems to be

3   in effect an amendment of ACCA. So, if in

4   effect it's an amendment of ACCA, why is it

5   treated differently or less exactingly than an

6   actual amendment of ACCA?

7   MR. RAYNOR: Justice Thomas, we

8   disagree that this -- this is equivalent to an

9   amendment of ACCA. We think the way to think

10   about this is there's the text of the ACCA and

11   then there's the external bodies of law that the

12   ACCA requires courts to consult.

13   And it's referring courts to external

14   bodies of law because it cares about the legal

15   landscape in existence at the time of the prior

16   conviction. The external bodies of law include

17   both the schedules and state law.

18   So just as in McNeill the Court said

19   you have to look at state law at the time of the

20   prior conviction, so too here.

21   CHIEF JUSTICE ROBERTS: Justice Alito?

22   Justice Sotomayor?

23   Justice Kagan?

24   Justice Gorsuch?

25   JUSTICE GORSUCH: Just to follow up on

1   Justice Thomas's question and not to belabor the

2   point, but let's suppose that the language of

3   g -- (e)(1) was exactly as it is, so all of your

4   textual clues are exactly as they are.

5   But, in (a)(1), instead of referencing

6   the -- the schedules, it listed drugs. You

7   concede, I think, that despite all of your

8   textual clues that you pointed to, that that

9   would be dynamic?

10   MR. RAYNOR: Justice Gorsuch, just to

11   clarify, if in (a)(1) it listed drugs?

12   JUSTICE GORSUCH: Yeah, if in (a)(1)

13   it said a serious drug offense means conviction

14   for the following substances: cocaine,

15   dah-dah-dah, not whatever the crazy drug is, you

16   know, that was added in or whatever, okay, but

17   if it listed those drugs, you -- I think you've

18   conceded multiple times that that would be

19   dynamic --

20   MR. RAYNOR: Correct.

21   JUSTICE GORSUCH: -- despite all of

22   the textual clues that you hang your hat on in

23   the preceding paragraph?

24   MR. RAYNOR: Right. And, Justice

25   Gorsuch, just to be clear about our analytical

 1   framework, if there's no cross-reference,

 2   there's no temporal question. So we think the

 3   cross-reference raises --

 4   JUSTICE GORSUCH: Right.

 5   MR. RAYNOR: -- the temporal question.

 6   JUSTICE GORSUCH: I -- I -- I

 7   understand that.

 8   MR. RAYNOR: And then the clues answer

 9   it.

10   JUSTICE GORSUCH: But all of the clues

11   wouldn't overcome the -- the dynamic nature of

12   the -- of -- of the statute in those

13   circumstances, right?

14   MR. RAYNOR: It -- I agree, it would

15   not overcome the actual text of the ACCA if the

16   ACCA was --

17   JUSTICE GORSUCH: Well, the only --

18   the only change I'm positing is the definition

19   of a -- of -- of a "serious drug offense" means

20   an offense under the Controlled Substances Act,

21   yada, yada, yada. Instead of that, it's just a

22   list.

23   MR. RAYNOR: Right. And -- and I'm

24   assuming the list also applies to subclause 2 in

25   your hypothetical?

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 1              JUSTICE GORSUCH:  Well, well -- yeah
 2   -- whatever.
 3              MR. RAYNOR:  Okay.
 4              JUSTICE GORSUCH:  It does, yeah.
 5              MR. RAYNOR:  Yeah.  So, if -- if
 6   Congress actually listed drugs in both subclause
 7   1 and subclause 2, we agree that a --
 8              JUSTICE GORSUCH:  That all the -- the
 9   -- the textual clues that you otherwise think so
10   important wouldn't overcome it?
11              MR. RAYNOR:  Correct, Justice Gorsuch,
12   and the reason is that we think those clues
13   answer the temporal question raised by the
14   cross-reference.  If you eliminate the
15   cross-reference, there's just no temporal
16   question in the first place.
17              JUSTICE GORSUCH:  Thank you.
18              CHIEF JUSTICE ROBERTS:  Justice
19   Kavanaugh?
20              Justice Barrett?
21              Justice Jackson?
22              JUSTICE JACKSON:  So can -- can I just
23   ask you again about the point of the
24   legislation?  Because you had a back-and-forth
25   with Justice Kavanaugh, and it seems to -- do
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 1   you -- does the government concede that

 2   incapacitation of certain serious offenders is

 3   what ACCA is about?

 4   MR. RAYNOR: At -- at a general

 5   level -- high level of generality, yes, Justice

 6   Jackson.

 7   JUSTICE JACKSON: Because that's what

 8   the -- the legislative history shows. I mean,

 9   there are -- we have House reports, we have

10   Senate reports that say the purpose of this

11   legislation is to curb armed habitual career

12   criminals, and then has a big discussion of how

13   we identify those people. So that's what this

14   is about, right?

15   MR. RAYNOR: Yes, Justice Jackson. At

16   a high level of generality, we agree this is

17   about incapacitating dangerous offenders.

18   JUSTICE JACKSON: And so, with Justice

19   Gorsuch's point of the -- and -- and Justice

20   Kagan's point, I just want to be clear. If

21   burglary is -- sorry. If other elements of this

22   definition are changed, like possession, for

23   example, hypothetically, you would agree that

24   we'd be looking at the current definition and

25   not the definition of "serious drug offense" at

1   the time of -- of the state conviction?

2   MR. RAYNOR: If Congress actually

3   amended in the text of the ACCA a definition of

4   burglary, we agree that definition would apply

5   to federal offense conduct occurring thereafter.

6   JUSTICE JACKSON: And why is that?

7   Why isn't that inconsistent with your argument

8   that we should be applying the law at the time

9   of the state offense?

10   MR. RAYNOR: The reason, Justice

11   Jackson, is we agree that what he's being

12   punished for is his federal firearm offense.

13   That's what this is punishing him for. But it's

14   looking to prior convictions to ascertain his

15   dangerousness, to ask: Is this the sort of

16   person we really don't want possessing a gun?

17   Is this a drug dealer who we really don't want

18   possessing a gun?

19   And in ascertaining the seriousness of

20   the prior convictions, it makes sense to look to

21   the legal landscape at the time and --

22   JUSTICE JACKSON: No, no, no. I'm

23   saying so we have a definition. We have a

24   definition of "serious drug offense," and the

25   definition says manufacturing, distributing, or

 1   possessing a controlled substance.

 2   You seem to be saying that if Congress

 3   changed that definition to drop possession out,

 4   you would not consider or you would -- you would

 5   apply the new definition, right --

 6   MR. RAYNOR: Correct.

 7   JUSTICE JACKSON: -- even if it

 8   previously included possession and it was a

 9   categorical match before, at the time of the

10   state conviction. I don't understand why the

11   same argument doesn't apply to a change in

12   controlled substance. It's just another element

13   of the definition. Congress changes it, so why

14   would you be saying that it has to be a

15   categorical match only back at the time and not

16   today?

17   MR. RAYNOR: Right. Justice Jackson,

18   we agree that the statute of conviction, the

19   ACCA, in effect at the time of the federal

20   offense is the one that applies because, if you

21   don't violate the version of the ACCA at the

22   time of your federal offense conduct, you

23   haven't violated the law.

24   But the ACCA references external

25   bodies of law. And so just as in McNeill the

 1   Court looked at the state law in effect at the

 2   time of the previous conviction, so too here.

 3   We think the -- this is an analogous inquiry.

 4   JUSTICE JACKSON: Thank you.

 5   CHIEF JUSTICE ROBERTS: Thank you,

 6   counsel.

 7   Mr. Adler, rebuttal?

 8   REBUTTAL ARGUMENT OF ANDREW ADLER

 9   ON BEHALF OF PETITIONERS

10   MR. ADLER: Thank you, Mr. Chief

11   Justice.

12   The colloquies between Justice

13   Jackson, Justice Kagan, Justice Thomas

14   illustrate why the government's position fails

15   in this case. I'd like to read you a quote from

16   this Court's decision in Engel versus Davenport

17   from 1926. It's on page 8 of our reply brief,

18   and it says that the "adoption of an earlier

19   statute by reference 'makes it as much a part of

20   the later act as though it had been incorporated

21   at full length.'" That is exactly what ACCA is

22   doing with the controlled substances schedules.

23   There is no legal basis to say that

24   ACCA -- that we would win this case had Congress

25   enumerated all of the substances, but we lose

         1   this case just because Congress incorporated

         2   them by reference. But, as Mr. Raynor

         3   repeatedly said at the podium today, that is the

         4   government's position in this case.

         5   We submit there is simply no legal

         6   basis to draw that sort of distinction. And we

         7   think that is simply the end of the case. The

         8   government's remaining arguments based on

         9   McNeill, culpability, backward-looking, all of

        10   that prove too much because it would apply to

        11   all of the criteria in ACCA, burglary,

        12   possession, everything in ACCA, and the

        13   government agrees that cannot be right. So --

        14   so that argument fails too.

        15   I want to address briefly the

        16   reference canon because it came up a bunch. I'm

        17   not sure why the government is referring to it

        18   because there's no dispute in this case that the

        19   reference canon, it's not -- the government's

        20   position is not even one of the options.

        21   There's two options. There's 1986, which would

        22   be for static reference, which no one thinks

        23   applies here, and there's a dynamic general law,

        24   which is -- everyone agrees this is dynamic.

        25   And so the question when you have a

1   general referent is, when does the question

2   arise under ACCA? The question arises when the

3   person commits the 922(g) offense. That's it.

4   Finally, I want to address notice to

5   address Justice Kavanaugh's earlier concerns and

6   -- and Justice Gorsuch's concerns about ex post

7   facto. Our position on that is that if you

8   think about a recidivist statute, a newly

9   enacted one, let's say, it would have to apply

10   to prior convictions that predated it. That's

11   the whole point of the recidivist statute. But,

12   if you analyze notice at the time of the prior

13   conviction, you couldn't do that. It would

14   violate the Ex Post Facto Clause in that

15   situation.

16   That's why ACCA covers pre-ACCA

17   predicates. Gryger versus Burke held that in

18   the exact same situation. And this is not

19   something of the past. Congress revises

20   recidivist statutes all the time. It just did

21   that in the First Step Act. The NAFD brief

22   talks about this.

23   841 is the federal drug statute. It

24   applies -- it has enhanced mandatory minimums

25   based on prior convictions for serious drug

1   felonies, serious violent felonies. Those are

2   brand-new terms.

3   So, under the government's view of

4   notice, those -- those terms don't -- that

5   statute doesn't apply to any conviction that

6   predates the First Step Act of December 2018?

7   That would be the logical implication of the

8   government's argument. And -- and nobody thinks

9   that Congress could have intended that.

10   We ask that the Court reverse the

11   judgment of the Eleventh Circuit. Thank you.

12   CHIEF JUSTICE ROBERTS: Thank you,

13   counsel.

14   The case is submitted.

15   (Whereupon, at 11:28 a.m., the case

16   was submitted.)

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